Supreme Court, U. S.
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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1404

LLOYD FOX and HOWARD JENSEN

Petitioners,

vs.

RICHARD F. KNEIP, GEORGE KANE, and ALICE KUNDERT, as members of the Board of School and Public Lands, and GEORGE KANE, as Commissioner of School and Public Lands,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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B. IF THE COMMISSIONER DID HAVE THE RIGHT TO UNILATERALLY ESTABLISH THE LEASE RATE, HE WAS REQUIRED BY THE ENABLING ACT TO COMPLY WITH THE SOUTH DAKOTA ADMINISTRATIVE PROCEDURES ACT.

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Petitioners, Lloyd Fox and Howard Jensen, by their attorneys, Marvin D. Truhe and Donn Bennett, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of South Dakota entered in this proceeding on December 7, 1977.

OPINION BELOW

The Supreme Court of South Dakota filed its opinion in the instant case on December 7, 1977. It is reported at 260 NW2nd 371 (SD 1977) and appears in Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of South Dakota was entered on the 7th day of December, 1977. Petitioners filed a Petition for Rehearing, which was denied on January 18, 1978. This Petition for a Writ Centiorari has been duly filed within ninety (90) days of the date of the opinion. It is a final judgment for purpose of review before this Court.

Petitioners had claimed a Right or privilege set up by a statute of the United States, namely the Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676 (Enabling Act), that being the Petitioners' Right to participate in the procedurally proper and lawfully held leasing of school and public lands, said lands having been granted by the Enabling Act subject to the Restriction that leasing by the State be conducted pursuant to such regulations as the legislature should provide.

The rule is that Jurisdiction lies where the Enabling Act was addressed in the Supreme Court's opinion and where it was essential to the decision. Montana ex rel. Haire v. Rice, 204 U.S. 291, 27 S. Ct. 281, 51 L. Ed. 490, 494, citing San Jose Land and Water Company v. San Jose Ranch Company, 189 U.S. 177, 47 L. Ed. 767, 23 S. Ct. 487.

It is clear from the subject opionion of the South Dakota Supreme Court's opinion that the above rule is applicable in the instant case. One of the reasons the trial Court had ruled against the Respondents was because the Commissioner's actions were not in compliance with the Enabling Act, SR 112-115. The South Dakota Supreme Court looked" to the roots of the authority" and quoted and reffered to the Enabling Act throughout its opinion. By overturning the trial Court's determination that Respondents were not in compliance with the Enabling Act there can be no question but that the South Dakota Supreme Court was in effect making a finding that Respondents' actions were in fact in compliance with the Enabling Act. The Enabling Act itself was therefore essential to the decision.

Jurisdiction lies with this Court pursuant to 28 USC § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commissioner of School and Public Lands is legally possessed of the right and power to unilaterally direct the leasing of school lands and unilaterally and without reference to the statutory formula provided for computation of the minimum leasing rate establish the minimum bid rate when a statute of the United States, namely the Act of February 22, 1889, required said lands to be leased under such regulations as the legislature might prescribe, and when the legislature had directed the Board of School and Public Lands and not the Commissioner to establish the minimum lease rate and to direct the leasing?

2. If so, must he comply with the Administrative Procedure Act (APA) in establishing the new rate or can he charge the rate at his own discretion?

STATUTES INVOLVED

Act of March 2nd, 1861, Chapter 86, 12 Statute at Large, 329; also found in South Dakota Compiled Laws Annotated 1967, Volume 1, page 173.

Act of February 22, 1889, Chapter 180, 25 Statutes at Large, 676; also found in South Dakota Compiled Laws Annotated 1967, Volume 1, page 183.

South Dakota Constitution
Article IV Section 7

Article VIII Section 6
Section 7
Section 9

South Dakota Code

SDCL 1-26-1

SDCL Chapter 5-5

STATEMENT OF THE CASE

Under § 10 of the Act of February 22, 1899, Chapter 180, 25 Statutes at Large 676 (Enabling Act) the United States Government granted to the State of South Dakota, upon its admission into the Union, sections 16 and 36 or each township, or lands equivalent to those sections, for the support of common schools (school lands).

Section 11 of the Enabling Act provided certain Restrictions upon the disposal of these school lands, to-wit:

> Except as otherwise provided herein, the said lands may be leased under such regulations as the Legislature may prescribe . . . The state may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this act, as may be acquired in privately owned lands through proceedings in eminent domain: provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secred to the state. The Enabling Act § 11, SDCL 1967, Volume 1,p. 189.

The State of South Dakota accepted the grant of school lands and impressed them with a trust held by the state. South Dakota Constitution Article VIII. § 7.

The state legislature implemented the Enabling Act under SDCL Chapter 5-5, therein establishing by law the entire procedure by which school lands were to be leased and, as integral parts thereof, establishing the minimum annual rental rate per acre and the powers and duties of the Commissioner of School and Public Lands (Commissioner) and of the Board of School and Public Lands (Board).

SDCL 5-1-1 created the Board, made the Commissioner a member of it, and provided for such powers and duties as granted in other sections.[1] SDCL 5-5-3 declared that the Board, not the Commissioner, would declare which lands were to be leased. SDCL 5-5-10.4 declared that the Board, annual rental rate per acre for all grazing lands administered by it. The Board, not the Commissioner, is also to give whatever instructions it deems necessary to the County Auditor conducting the lease auction. SDCL 5-5-6.

On February 27, 1976 George Kane, the Respondent Commissioner, at a meeting which had originally been noticed for the Board[2], declared that he individually and in his capacity as Commissioner was setting a rate of Four Dollars Fifty Cents ($4.50) per animal-unit-month as the rental rate from which bidding at auctions for school and public lands leases would commence. Settled Record pp (SR) 91-92.

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1. Effective July 1, 1976 SDCL 5-1-1 was repealed and the Board abolished. Session Laws 1976, Chapter 20, §14. The Commissioner's powers and duties were not expanded by statute.

2. On February 20, 1976, a NOTICE OF INTENT TO ADOPT EMERGENCY RULE appeared in the Rapid City Journal and other papers around the State. Published by order of the Board of School and Public Lands the Notice stated that "The Board, pursuant to the authority vested by administrative procedures act . . ." proposed to adopt an emergency rule establishing the minimum rental fee per animal-unit-month for grazing leases, for state, school and endowment lands. The Notice did not state any time or place for hearing on the proposal. "SR" 109, 30.

The Commissioner established the Four Dollars Fifty Cents ($4.50) minimum rate because he didn't believe the lease rates as computed by statutes produced sufficient revenue, and he (not the Board) therefore notified the county auditors of the new minimum bid rate. SR 85, 86, 109. Respondents never offered evidence[3] that the Four Dollars Fifty Cent ($4.50) rate constituted either the full market value or the fair market value of the leases.

The Administrative Procedures Act (APA) had not been complied with in setting the new rate. SR 109.

The Commissioner had, by his own discretion, set the new rate and he admitted that it was a considerably different rate than it would have been if it had been computed by SDCL 5-5-10.4 SR18.

Petitioners filed an action seeking Declaratory Judgment and further sought an injunction against the Respondents. On March 5, 1977 the Circuit Court of the Eighth Judicial Circuit, Harding County, South Dakota issued and Interlocutory Injunction which, upon Petitioners filing an undertaking, restrained Respondents from establishing any rental rates other than as provided by South Dakota law. SR9.

On June 10, 1976 the Circuit Court ordered Summary Judgment for Petitioners, one of the reasons being, Respondents' failure to comply with the APA in establishing the rate and because the Commissioner had usurped the authority of the Board. SR 112-115.

The Respondents successfully appealed to the Supreme Court of South Dakota. The Court ruled, inter alia, that because he had the power to disapprove leases the Commissioner could himself establish the minimum rate at which leasing auctions would begin, that he was not bound by the statute in that regard and that his rate-making was not rate-making subject to the APA. 260 NW3nd at 374. The South Dakota Court did not address the question of the Commissioner's actions having usurped the power of the Board and having been outside his statutory authority.

3. All evidence in the case was by affidavit.

FEDERAL QUESTION

The federal question in this case arises because of the Enabling Act. It was through the Enabling Act that the State of South Dakota was first granted the lands, the leasing of which is the subject of this case. The Enabling Act clearly required the state legislature to implement the conditions of the grant, namely that said lands "be leased under such regulations as the Legislature may prescribe." Enabling Act § 11. The legislature did implement the Enabling Act through enactment of SDC. Chapter 5-5. It was the Respondent Commissioners refusal to abide thereby which Petitioners complained of. By his refusal to abide by the state statutes implementing the Enabling Act he was refusing to act in accordance with the Enabling Act itself, the superior authority, which had attached a covenant to run with the land forever demanding that if the lands are leased they be leased under such regulations as the legislature may prescribe.

Petitioners' reliance upon the Enabling Act was first stated in Petitioners' Complaint, SR 2-3, wherein Petitioners complained that Respondents' actions were

> void and null for failure of the Respondents, and each of them, to follow constitutional or statutory requirements in establishing the minimum annual rental rate as delineated by the following: That the Enabling Act (Act of February 22, 1889) of the State of South Dakota, Section 11, provides that.'. . . said lands may be leased under such regulations as the Legislature may perscribe.'

Petitioners next submitted a Brief In Support of Action For Declaratory Judgment and Interlocutory Injunction, SR 20 - 25, wherein Petitioners cited the Enabling Act and referred to it several times, pointing out that it was the superior authority concerning the Respondents' action and that the Constitution and statutes of South Dakota must therefore be read and interpreted together with the Enabling Act. SR 24. Respondents also cited the Enabling Act numerous time in Defendents' Brief. SR-56-67.

The trial court granted Summary Judgment to the Petitioners, SR 112-115, stating in its Conclusions of Law that the rate established by Respondents was invalid for lack of authority and non-conformity with the Enabling Act, the Constitution of the State of South Dakota and the state's statutes. SR 114-115. The trial court subsequently reaffirmed same in its Judgment and Decree shown at SR 137-138.

The federal question of compliance with the Enabling Act was preserved by Respondents in the Assignments of Error to the Supreme Court of South Dakota at § 11, SR 118, to wit:

> "The trial court erred in concluding that the rental rate established by George D.

> Kane, was invalid because of its failure to conform with the South Dakota Constitution, the Enabling Act, and South Dakota statutes."

On appeal the Supreme Court of South Dakota recognized 1) that the Enabling Act had granted the land to the state and authorized the leasing thereof under legislature regulations, 2) that the State Constitution in effect accepted the land on behalf of the state. and 3) that the legislature had implemented the Enabling Act through SDCL Chapter 5-5, including therein a formula for the computation of the minimum rental rate. 260 NW2nd373. The Supreme Court of South Dakota then went on to hold it permissible for the Commissioner to unilaterally establish the minimum rate from which bidding on leases could begin and, that in so doing, he was not controlled by the APA.

REASONS

AND ARGUMENT

FOR ALLOWING THE WRIT

This case presents an unusual factual and procedural situtation. The United States had given school lands to the State and limited the leasing of these lands to such procedures as the legislature would prescribe. The legislature prescribed detailed procedures for leasing, including rate computation and delegation of responsibilities. Then the Commissioner, not the one delegated to compute the rate nor direct the auctions of leases, established a rate other than as prescribed by the statutes and took it upon himself to direct the leasing.

When sued by Petitioners Respondents did not deny ignoring the statutes but instead argued that the Commissioner had the inherent authority to ignore the legislature. The trial court held that he did not and Respondents appealed, making the same argument.

On appeal, while ignoring the Commissioner's lack of authority to act and assuming facts not judicially noticed nor supported by evidence, the South Dakota Supreme Court reversed in favor of Respondents--that since the Commissioner had a veto power over leases he implicitly had the power to set the lease rate himself. Accordingly, the Commissioner now appears to have the power to establish lease rates on school lands at his unfettered discretion.

By its decision the Supreme Court of South Dakota has effectively established the Commissioner as a Fourth branch of the State Government, free to establish lease rates at his own discretion and otherwise to act contrary to the Legislative directives and therefore, the Enabling Act.

The official approval of the Commissioner' s actions presents a substantial federal question because Congress, when it granted the State of South Dakota the land in its Act of February 22, 1889, clearly required that said lands be leased in accordance with such regulations as the legislature might provide. As appears in the following the legislature did provide controlling legislation, both directly through a chapter on agricultural and grazing leases, SDCL 5-5, and indirectly through the Administrative Procedures Act. To allow the Commissioners actions would not only allow him to avoid the state statutes it would also thwart the expressed intention of the United States Congress.

A. SINCE THE LEGISLATURE HAD PROVIDED A STATUTORY FORMULA FOR ARRIVING AT THE MINIMUM LEASE RATE, HAD PROVIDED THAT THE BOARD SHALL REGULATE LEASING AND HAD DIRECTED THAT THE COUNTY AUDITORS SHALL PROCEED TO LEASE IN ACCORDANCE WITH INSTRUCTIONS FROM THE BOARD, THE COMMISSIONER ACTED WITHOUT LEGAL AUTHORITY WHEN HE UNILATERALLY ESTABLISHED A LEASE RATE DIFFERENT THAN THE STATUTORY RATE AND UNILATERALLY INSTRUCTED THE COUNTY AUDITORS TO PROCEED TO LEASE UPON HIS DIRECTION.

There is no question but that the Enabling Act is the superior legal authority in the instant case. See Jourdan et al v. Barrett et al, 11L. Ed. 924,931. As the Enabling Act it empowered the people of South Dakota to form a constitution and state government. SDCL 1967, Volume 1, p.183. Additionally section 10 gave the State the sections numbered sixteen (16) and thirty-six (36) in every township for the support of schools, SDCL 1967, Volue 1, p. 188, in accordance with S 14 of the Organic Law, (Act of March 2, 1861, Ch. 86 12 Stat. at L. 239) SDCL 1967 Volume 1, p. 180. The Enabling Act next provided, inter alia, that "Except as otherwise provided herein, the said lands may be leased under such regulations as the Legislaure may prescribe." Enabling Act § 11.

In Addition to the above, Congress added the following proviso to assure that:

> . . . none of such lands, nor any estate of interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition . . . Enabling Act § 11, SDCL 1967, Volume 1, p. 189. (Emphasis added.)

It appears, therefore, that Congress intended to make it very clear that these school lands granted to the State were not to be leased except in such a manner as by law and regulations was prescribed by the State Legislature. Obviously, then, while South Dakota was given the lands, it was restricted by the Enabling Act in the manner by which interests in those lands could be disposed of. The subsequently enacted South Dakota Constitution recognized those restrictions and added still more restrictions on disposition, specifically including leasing.

> The lands mentioned in this article shall be leased for pasturage, meadow farming, the growing of crops of grain and general agricultural purposes, and at public auction after notice . . . South Dakota Consitution Article VIII, §9.

The Commissioner was created as an elected officer by Article IV, § 7 of the South Dakota Constitution. However, there are no powers of said officer enumerated therein.

The states' legislature did implement the Enabling Act and the state's Constitution, at least in reference to the leasing of the land, in SDCL 5 5 (1967). In that chapter the South Dakota Legislature covered four (4) very important areas: (1) The Commissioner of School and Public Lands; (2) the Board of School and Public Lands (Board); (3) the procedure for leasing school and public lands; and, (4) the minimum annual rental rate per acre of said lands.

THE BOARD

The first section of Chapter 5, SDCL 5-1-1, creates the Board, places the Commissioner on it, and provides for such powers and duties as may be

given it in subsequent sections. SDCL 5-5-3 instructs that the Board shall designate the lands to be leased. The Board is also to establish the minimum annual rental rate per acre for all grazing lands administered by the Board pursuant to the formula provided by the Legislature. SDCL 5-5-10.4. The Board is also to give whatever instructions it deems necessary to the County Auditor conducting the lease auction. SDCL 5-5-6.

In the instant case, however it appears as fact that the Appellant Commissioner (1) individually set the minimum rental rate, (2) set a different rate than that which would have resulted if the statutory formula had been used, and (3) instructed the County Auditors that the minimum rates determined by himself individually constitute the "price per acre," all of which is contrary to the above statutes.[4]

THE COMMISSIONER

The office of the Commissioner was created within the Executive branch by Article IV, § 7 of the Constitution of the State of South Dakota.

In dealing with the Commissioner in SDCL 5-5 the Legislature recognized the duties imposed upon him by the Constitution and delegated more duties to him. It also gave him the power of "general supervision of all leasing of school and public lands." SDCL 5-1-7. This was meant to be merely an administrative function, however, consistent with the nature of other duties delegated him by other statutes and the South Dakota Constitution.

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4. SDCL 5-1-1 was repealed in 1976, all the statutes cited above were in full force and effect at the time this action was begun. The other statutes remain as represented.

See South Dakota Constitution Article VIII, §6, SDCL 5-1-7 and SDCL 5-5-10.2

While it was the Board which had been assigned the task of determining the minimum rental rate, the Commissioner was to have a role to play in the determination of said rate. One of the integral factors of the formula provided in SDCL 5-5-10.4 for the determination of the minimum annual rental is the animal-unit-month carrying capacity (AUM) of the subject land. SDCL 5-5-10.2 establishes that it is the duty of the Commissioner

> . . . to cause the grazing lands administered by the state to be appraised as to their animal-unit-month carrying capacity, and to make and preserve a record thereof in his office, and at least every ten years case said lands to be re-examined as to their animal-unit-month carrying capacity so as to keep the records thereof in his office reasonably accurate.

The Commissioner is aided in this by statutory definitions of "animal unit" and "animal-unit-month" SDCL 5-5-10.1 (1) and (2), and by an enumeration of factors to be considered in appraising such grazing lands. SDCL 5-5-10.3

Other than by causing the appraisal to be made the Commissioner was to have no statutory role in setting the minimum annual rate, except in his capacity as a member of the Board, since it was the Board that had the duty to establish that rate. SDCL 5-5-10.4.

The delegated powers and duties of the Commissioner can therefore best be described as MINISTERIAL, for the leasing was to be by auction and the Commissioner was never empowered to set the

leasing rates, only to assist in the computation of the minimum rate.

LEASING PROCEDURE

The requirement that the land be leased at public auction after notice initially appeared as a restriction in Article VIII, §9 of the South Dakota Constitution. These constitutionally imposed requirements were codified in SDCL 5-5-4 and SDCL 5-5-5. Provisions for the actual conduct of the public auction were enumerated in SDCL 5-5-6, which provided, inter alia, (1) that the auction would be conducted by the County Auditor, and (2) that the lands would be offered for lease to the highest bidder.

MINIMUM ANNUAL RENTAL RATE

The law regarding this rental rate begins, again, in the Enabling Act, where Congress expressed its concern by placing certain restrictions upon the State in regard to the school lands. Congress first restricted the leasing of such lands by requiring that it could be leased only "under such regulations as the Legislature prescribed." Congress further provided that:

> . . . none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition ... nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state. Enabling Act, § 11.

Clearly Congress took care to insure that said lands could not be leased except pursuant to

the "general laws" and "such regulations as the Legislature may prescribe." The Legislature had the power and the duty to codify laws prescribing the manner in which the lands could be leased. Otherwise the lands could not be leased at all.

Not only did the Enabling Act authorize the Legislature to codify leasing procedures, discussed supra, but a careful reading of §11 also reveals that it required the Legislature to provide for a method of determining what the fair market value of the leasehold was. This requirement appears toward the end of the third paragraph of §11 of the Enabling Act, where it provides that no

> estate or interest therein shall ever be disposed of . . . unless the full market value of the estate or interest disposed of, to be ascertained insuch a manner as may be provided by law . . . Enabling Act, S 11. (Emphasis added.)

The Legislature fulfilled this obligation by the statutory scheme of offering the leasehold interest for lease to the highest bidder at a public auction where the bidding is to begin at a statutorily determined minimum keyed to the fluctuating economy and economic well-being of the cattle industry that would be using the grazing lands. SDCL 5-5. See Rider v. Cooney,94 Mont. 295, 23 P 2d 261 (1933) for a well reasoned case in point with a contrary result.

As has already been discussed supra, it was the Board, not the Commissioner, which was to establish the minimum annual rental rate for grazing lands. Computations were to be made pursuant to the following directive:

> In fixing the minimum annual rental per acre, the following formula shall be used:
>
> The rental rate shall be multiplied by twelve times the animal-unit-month carrying capacity of each section of land or portion thereof divided by the number of acres of such section of land or portion thereof. In this formula, animal-unit-month carrying capacity shall be based on an aprraisal made- within the immediate past thirty-six month period.
>
> The carrying capacity of the land, to be used in the above formula, shall be in accordance with the determination of the commissioner of school and public lands made pursuant to the appraisal of grazing lands provided in §5-5-10.2.
>
> The average price per pound of all beef cattle on the farms in South Dakota shall be taken from statistics published by the South Dakota crop and livestock reporting service of the United States department of agriculture current at the time of computation of the rental. SDCL 5-5-10.4

The terms used in the formula are defined as follows:

> "Animal-unit-month carrying capacity," the number of animal units which can subsist on natural feed on one section of land for one month;" SDCL 5-5-10.1(2).
>
> "Rental rate," fifty cents plus three times the average price per pound of all

beef cattle on the farms in South Dakota for the last reported five years. SDCL 5-5-10.1 (3).

Instead of an auction held by the County Auditors at the direction of the Board with bidding begun at the statutory rate, however, the auction in the instant case was held at the Commissioner's direction with bidding begun at a rate the Commissioner had set at his own discretion. Apparently what the Commissioner had done to establish the new minimum rate was to determine the statutary rate and then increase it by an arbitrary 75%. SR 86. The Commissioner's purpose was boldly and clearly stated to be the production of increased revenue. SR 85. Respondents did not even argue much less submit evidence to establish that the discretionarily established rate constituted the "full market value." Accordingly, the trial court made no such finding.

Respondents in fact never even argued that they had conducted the auction in compliance with the legislative scheme, but instead argued that as a trust officer the Commissioner had the inherent authority to disregard the legislature!

Clearly Respondents had intended no compliance with the statutes. However, they were saved by the South Dakota Supreme Court which found that since the Commissioner had the authority to disapprove leases no one should complain if he set the lease rates in the first place. The court thereby found Respondents to be in compliance with the Enabling Act, Constitution, and statutes.

The South Dakota Supreme Court did not, however, point out how this is any different than holding that the Governor (Executive Department) derives the power to decree such laws as suit him

from his power to disapprove (veto) any laws the legislature might pass that were not suitable to him. This is clearly not the law, however, for legislative powers can of course not reside in the Executive Department of the Government due to the separation of powers doctrine. That doctrine is far too important and basic to our system of government to allow its subversion by the simple device of implying a power to legislate from the veto power which is specifically granted the Executive Department.

This far-reaching effort by the State's Court upholding the actions of an officer of the State's Executive Department can not therefore be allowed to stand. The Enabling Act was clear in its mandate -- the lands must be leased pursuant to regulations prescribed by the legislature at the market value ascertained in the manner prescribed by law. Neither Respondents' actions nor the South Dakota Supreme Court's decision can be reconciled with the Enabling Act -- The Executive Department (Commissioner) simply did not have a role to play in establishing either the procedures for leasing school lands or the lease rates.

This court must accordingly reverse and reinstate the trial court's ruling.

B. IF THE COMMISSIONER DID HAVE THE RIGHT TO UNILATERALLY ESTABLISH THE LEASE RATE, HE WAS REQUIRED BY THE ENABLING ACT TO COMPLY WITH THE SOUTH DAKOTA ADMINISTRATIVE PROCEDURES ACT.

Again, §11 of the Enabling Act provided that

> the said lands may be leased under such reuglations as the Legislature may prescribe."

As has been discussed supra, the legislature passed detailed legislation dealing directly with the leasing of school lands.

The legislature also codified an Administrative Procedures Act (APA) for this State. In its opinion the South Dakota Supreme Court seems to concede that the office of the Commissioner is subject to the APA. However, the court held the Commissioner's rate-making not to be rule-making for apparently two (2) reasons, namely: (1) because it was an exercise of his discretion: and (2) because his rate-making did not, the court felt, fall within the definitions of a rule, that is, it (a) did not resemble a legislative act, and (b) was not addressed to unnamed and unspecified persons or situations. 260 NW2nd at 375.

In the first instance the court relied upon its holding that rate-making was within the discretionary power of the Commissioner, that power again having been derived from his power to disapprove leases. The court then cited as authority an old South Dakota case, State ex rel. Green v. Knight, Commissioner of School and Public Lands, 47 S.D. 224, 197 NW 159 (1924). Knight, however, does not squarely address the issue of this case and is persuasive only if it is first conceded that the Commissioner has obtained discretionary power to set lease rates implied and derived from his delegated power to disapprove leases.

There is no question but that the legislature empowered the Commissioner to disapprove leases, and all that Knight represents is that in so doing the Commissioner is not subject to the APA.

In Knight the Commissioner had acted only after the auction, after the bid had been entered and accepted by the auditor and, of course, his action affected only one lease. Rate-making, as

presented in the case at bar, is readily distinguishable in that it occurs before the auction and necessarily affects all leases and all individuals who bid thereon. And that brings us to the court's second reason, i.e., that the Commissioner's action did not fit within the definition of "Rule".

It first should be noted that in stating that the Commissioner's action "clearly does not fall within theses definitions" the court did not even refer to the definition of a Rule as adopted and codified by the legislature of this State. 260 NW2d at 375. Instead the court stated that

> A rule (or a "regulation" -- a term used interchangeable with rule) is the product of rule making and rule making is the part of the administrative process that resembles the legislature's enactment of a statute. Rule making is the issuance of regulations or the making of determinations which are addressed to indicate but unnamed and unspecified persons or situations. Fox at 375.

By setting the new rate the Commissioner actually sets the price of a lease, at least according to the court's opinion, since the minimum rate is the successful bid rate. Fox at 374. Accordingly it cannot be denied that, referring to the court's own definition above, what the Commissioner did by setting the rate was to issue the regulation (rate) or determination which was addressed to indicated but unnamed and unspecified persons -- potential school land users who would be expected to bid at auction.

What clearly appears is that the Supreme Court of South Dakota has erred on this point, even by application of its own stated test, as above.

The Rule is just as clearly the contrary.

Even our own statute, SDCL 1-26-1 (7) states that

> "'Rule means each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency . . ."

The statute is all inclusive except for specified exceptions. The Commissioner is not specified in any exception. Other officers of the Executive Branch, however, are excepted to the extent of

> SDCL 1-26-1(7) (c) official opinions issued by the attorney general pursuant to § 1-11-1; and
>
> SDCL 1-26-1(7) (d) executive orders issued by the Governor.

The Commissioner's rate-making is not exempted from the definition of a rule and, since it is generally applicable and at the very least implements the policy or procedure of the office of the Commissioner there is no room left for doubt -- the Commissioner's rate is a "rule" according to South Dakota law.

> Rate-making or price-fixing is purely or essentially a legislative function . . . 1 Am Jur 2d, Administrative Law §129.
>
> Legislation looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial . . . Davis, Administrative Law Text, S501 (3rd ed. 1972) p. 124, quoting Mr. Justice Holmes from Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 29 S. Ct. 67, 69, 53, L. Ed. 150, (1908).

Without question the Enabling Act requires that school lands be leased in accordance with such regulations as the legislature prescribed. The legislature established a leasing procedure by auction and provided by statute a formula for the minimum leases rate. Should the courts determine that the Commissioner can lawfully at his discretion establish a different minimum lease rate he must at the very least be bound by the South Dakota APA which the legislature provided to provide guidance and control of the state's agencies and the rules promulgated. The office of the Commissioner is an agency and since the legislature promulgated the APA to regulate the state's agencies, section 11 of the Enabling Act requires his compliance therewith.

To allow the Commissioner to establish leasing rates at his discretion free from even the inconvenience of the APA would establish the Commissioner as an agency free of legislative restrictions, free to effectively act as the fourth branch of our state government.

CONCLUSION

In the leasing of school lands granted to the State of South Dakota by the United States Government through the Enabling Act, the leasing must be proceeded with by the leasing authority in accordance with South Dakota law. The leasing was in fact proceeded with by other than the properly delegated authority in disregard of the legislatively

enacted regulations prescribed by the Enabling Act. Petitioners have thereby been deprived of a right assured them by a statute of the United States, namely the Enabling Act, in that they have not been allowed to participate in the leasing of school lands as intended by the Congress of the United States.

Respectfully submitted,

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March, 1978

APPENDIX A.

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 12084

Lloyd Fox and Howard Jensen,
Plaintiffs and Respondents,

vs.

Richard F. Kneip, George Kane, and Alice Kundert, as members of the Board of School and Public Lands, and George Kane, as Commissioner of School and Public Lands,
Defendants and Appellants,

Appeal from the Circuit Court of the Eight Judicial Circuit Harding County, South Dakota

[September 5, 1976]

Before Brandenburg, Circuit Judge.

MORGAN, Justice.

In 1972 the Commissioner of School and Public Lands having noted that by application of the leg-

islative mandated minimum bid formula (SDCL 5-5 10.1 to 10.4) the school and public lands across the state were being leased for about the same amount per acre as the counties were asking the state to pay in lieu of taxes, and having determined that the formula result did not approximate the fair market value of the leases, unilaterally applied a 50% increase factor to the formula result for lands advertised for lease bids that year. In 1973 the Commissioner, still dissatisfied with the discrepancy between the adjusted figure and what he determined to be the fair market value, applied a 75% increase factor to the formula for lease bids that would realize an additional $116, 500 for lease lands for that year. The plaintiffs, respondents herein, filed an action for declaratory judgment that the Commissioner was required by law to use the statutory formula for the minimum bid figure and sought an injunction requiring him to do so. Cross-motions for summary judgment resulted in a judgment for the respondents which, in essence, determined that: (1) the Commissioner and the Board of School and Public Lands (Board) are "agencies" under the APA (SDCL 1-26); (2) that the establishment of the minimum lease rate was a "rule" under the APA; (3) that the authority to establish such rate was in the Board but the Commissioner had usurped the right and duty of the Board; and (4) that the so-called rule was invalid. The trial court further granted an injunction against the Board and the Commissioner from establishing any rule setting forth a minimum lease rate other than that provided by formula. We reverse.

Two questions are raised by this appeal. The first, is there a right or duty on the part of the Commissioner to tamper with the results of the legislature's formula for minimum bid price and the second, assuming that the answer to the first is in the affirmative, is the Commissioner in so doing

engaged in the process of rule making amenable to the requirements of the APA.[1]

A determination of the questions presented requires a review, to some extent, of the history of our state lands and the laws enatcted with respect thereto going back to the Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676.

Under § 10 of the Enabling Act the State of South Dakota received from the United States Government sections sixteen and thirty-six of each township, or lands equivalent to those sections. Certain restrictions were placed on the disposal of these lands as stated in § 11 of the Enabling Act. The provisions pertinent to the leasing of school lands are:

> . . . Except as otherwise provided herein, the said lands may be leased under such regulations as the Legislature may prescribe.
>
> . . . The state may also, upon such terms as it may prescribe grant such easements

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1. Because the Board did not attempt to set the new minimum lease rate, because a 1976 amendment to SDCL Chapter 5-5 abolished the Board as previously constituted and the 1977 Legislature established a new Board which by statute is merely an advisory board we confine this discussion to the relationship between the Commissioner and the legislature apropos the management of the school and public lands. It should further be noted that in discussing the facts of this particular case we are talking about, unless otherwise specifically noted, the leasing of grazing land as opposed to tillable land referred to in the statutes as agricultural land.

or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless full market value of the estate, or interest disposed of,[2] to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state. (emphasis added).

Article VIII of the South Dakota Constitution deals with school lands. Section 2 threrof provides that all property acquired for public schools shall be and remain in a perpetual fund for the maintenance of public shcools in the state, and denominates the fund as a trust fund held by the state.

The Enabling Act granted the land to the "state" and authorized the leasing thereof under legislative regulations. The Act further admonished the state that no estate or interest should be disposed of unless the full market value ascertained as by law is paid.

The Constitution (Art. VIII) in effect accepted the land on behalf of the state, implemented the conditions for sales and leasing as required by the Enabling Act, declared the property and the proceeds from the sale thereof as a perpetual fund, and impressed it as a "trust fund".

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2. "Disposed of " has been defined as to include the leasing of lands on a rental basis. Rider v. Cooney, (Mont.) 23 P.2d 261 (1933).

At the same time, in adopting Article IV, the position of the Commissioner of School and Public Lands was created by § 12 and he was given the powers and duties as prescribed by law in S 13.[3]

The legislation implementing the Enabling Act and the South Dakota Constitution is now codified under SDCL Chapter 5-5. The statutes provide that the Commissioner shall have the direction, management and control of the lands (5-1-7) and have set forth the various leasing procedures that must be followed, including the minimum rental rate prescribed under SDCL 5-5-10.4.

The respondents in their suit contended, and the trial jude agreed, that the Enabling Act grants the land to the state to be leased under regulations prescribed by the legislature; that the legislature adopted SDCL 5-5-10.1 to SDCL 5-5-10.4 as a formula for arriving at a minimum at to which bidding on leases shall commence; that the Commissioner has no authority to deviate from the legislative mandate to commence bidding at the figure, and therefore his instructions to the county auditors were invalid, or in the alternative that if he did have authority he had to act in conformity with the APA.

The thrust of the Commissioner's argument is that the Enabling Act mandates that the land be leased for its fair market value and that the minimum annual rental rate formula does not return fair market value to the state; and that as constitutionally designated Commissioner of School and Public Lands, he is designated as trustee, and

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3. The 1972 Constitutional Amendment retained the Office of Commissioner but deleted the provisions with reference to powers and duties.

as trustee he has inherent authority to disregard the legislature to the end of obtaining fair market value.

It is obvious in discussing "fair market value" and "minimum annual rental rate" we are not using the terms synonymously. However, although the record does not affirmitively set forth that, in most cases the figures set as minimum were the successful bid prices for lack of competition at the "auction sale" such is implicit throughout; for if there were competition for the leases the minimum formula figure would be of little importance, inasmuch as the competitive bidding would ascertain what the full market value is. Lacking the competitive sale we must look further to the roots of the authority of the respective governmental entities, for nowhere in the Enabling Act is the Commissioner or Board of School and Public Lands mentioned, nor does the constitution grant the Commissioner any special powers or duties or designate him to be sole trustee of the school lands and funds.

We agree with the respondent that the legislature, under its authority to create leasing regulations, has authority to set a formula for a minimum annual rental rate on leases. However, we so hold that the formula does not purport to set the fair market value but is merely a minimum point from which to commence bidding. Were it otherwise we would have to seriously consider the constitutionality of the statutory formula, for it incorporates at least one ingredient that has no direct bearing on the value of the land but rather appears to be a measure of the state of the beef cattle industry.[4]

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4. While we agree that such ingredient might be one of many factors that a prospective lessee might consider in determining whether to bid or not, and if so how high to bid, it is certainly not the sole criterion. The 1977 Legislature changed the criteria from average price per pound of all beef cattle to the average price of a 425 pound calf.

We hold, however, that the Commissioner has authority to ascertain the fair market value of the leasehold interests and to require that such value be obtained. In arriving at this decision we do not have to determine whether or not this authority is inherent in the Commissioner by reason of his constitutionally designated position, for indeed the legislature in its wisdom, for years, has given the Commissioner (and the governor) the authority to reject leases.[5] While we find that the Commissioner did not go through the procedural steps of rejecting the leases, he did, in effect, advise the county auditors of the minimum price per acre that he considered to be fair market value and which value must be obtained before he, in the exercise of his statutory authority, would approve the leases. We therefore hold that while the Commissioner does not have authority to disregard the minimum annual rental rate determined by statutory formula, he is not bound to accept it as a maximum or as a fair market value; and therefore his actions in the instant case were not prejudicial to the respondents but rather worked to the advantage of both the respondents and the state, inasmuch as at the time of bidding, respective lessees were advised as to the figure that he considered the fair market value which must be obtained before he could or would approve the various leases.

We further hold that the Commissioner, in exercising his authority as granted by the legisla-

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5. SDCL 5-5-15: "If the commissioner approves such lease, he shall submit the same to the Governor for his approval.* * *"

ture, is not controlled by the APA. As this Court said in the case of State ex rel Green v. Knight, Commissioner of School and Public Lands, 47 S.D. 224, 197 N.W. 159. (1924):

> . . . [I]t is clear that the approval of a lease of state land by the commissioner of school and publis lands is a matter that involves official discretion on his part, over which this court has no right of c ntrol . . . whether he should approve or disapprove is a matter depending entirely upon his own judgment, and when this judgment has been exercised it is final, assuming, of course, that there has been no fraud or other misconduct committed by the commissioner.

Such exercise of discretion is clearly not rule making as defined in SDCL Chapter 1-26.[6]

A rule (or a "regulation" -- a term used interchangeably with rule) is the product of rule making and rule making is the part of the adminis-

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6. SDCL 1-16-1.7 states:
(7) "Rule means each agency statment of general applicability that implements, interprets, or prescribes law, policy procedure, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule, but does not inclue:
(a) statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public or
(b) declaratory rules issued pursuant to S 1-26-15;

trative process that resembles the legislature's enactment of a statute.[7] Rule making is the issuance of regulations or the making of determinations which are addressed to indicated but unnamed and unspecified persons or situations. [8] The discretionary authority given to the Commissioner by the legislature clearly does not fall within these definitions.

Our earlier action on the state's motion to vacate the injunction in response to which we ordered the area of the injunction to be diminished from all school lease lands to the lands previously held by respondents effectively disposed of that issue on appeal.

We therefore reverse the decision of the trial court and remand the same with instructions to enter judgment in favor of the appellants and against the respondents and to determine what damage, if any, was suffered by the state and give judgment against the respondent in such amount.

All the Justices concur.

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7. Davis, Administrative Law Treatise, § 5.01 at p. 285.

8. Fuchs, Procedure in Administrative Rule - Making, 52 Harv.L.Rev. 259, 265 (1938).

APPENDIX B.

STATUTES AND REGULATIONS INVOLVED

THE ORGANIC LAW

SEC. 14

And be it further enacted, that when the land in said territory shall be surveyed, under the direction of the government of the United States; preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the states hereafter to be erected out of the same.

THE ENABLING ACT

SEC. 11

That all lands granted by this act shall be disposed of only at public sale after advertising --tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre. Any of the said lands may

be exchanged for other lands, public or private of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the state.

Except as otherwise provided herein, the said lands may be leased under such regulations as the Legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective states; leases for grazing and agricultural purposes shall be for a term not longer than ten years and leases for development of hydroelectric power shall be for a term not longer than fifty years.

The state may also, upon such terms as it may perscribe, grant such easements or rights in any of the lands granted by this act, as may be acquired in privately owned lands through proceedings in eminent domain: provided, however, that none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the state.

With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof shall constitute permanent funds for the support and maintenance of the public schools and the various state institutions for which the lands have been granted. Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be avail-

able for the acquistion and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions. Any state may, however, in its discretion, add a portion of the annual income to the permanent funds. Notwithstanding the foregoing provisions of this section, each of the states of North Dakota, South Dakota, and Washington may pool the moneys received by it from oil and gas and other mineral leasing of said lands. The moneys so pooled shall be apportioned among the public schools and the various state institutions in such manner that the public schools and each of such institutions shall receive an amount which bears the same ratio to the total amount apportioned as the number of acres (including any that may have been disposed of) granted for such public schools or for such institutions bears to the total number of acres (including any that may have been disposed of) granted by this act. Not less than fifty per centum of each such amount shall be covered into the appropriate permanent fund.

The lands hereby granted shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted.

SOUTH DAKOTA CONSTITUTION

Article IV, § 7

There shall be chosen by the qualified electors of the state at the general election of the Governor and every four years thereafter the following constitutional officers: attorney general, secretary of state, auditor, treasurer, and commissioner of school and public lands, who shall severally hold their offices for a term of four years.

Article VIII, § 6

All sales shall be conducted through the office of the commissioner of school and public lands as may be prescribed by law, and returns of all appraisals and sales shall be made to said office. No sale shall operate to convey any right or title to any lands for sixty days after the date thereof, nor until the same shall have received the approval of the Governor in such form as may be provided by law. No grant or patent for any such lands shall issue until final payment be made.

Article VIII, § 7

All lands, money or other property donated, granted or received from the United States or any other source for a university, agricultural college, normal schools or other educational or charitable institution or purpose, and the proceeds of all such lands and other property so received from any source, shall be and remain perpetual funds, the interest and income of which, together with the rents of all such lands as may remain unsold shall be inviolably appropriated and applied to the specific objects of the original grants or gifts. The principal of every such fund may be increased, but shall never be diminished, and the interest and income only shall be used. Every such fund shall be deemed a trust fund held by the state, and the state shall make good all losses therefrom that shall in any manner occur.

Article VIII § 9

The lands mentioned in this article shall be leased for pasturage, meadow, farming, the growing of crops of grain and general agricutural purposes, and at public auction after notice as hereinbefore provided in case of sale and shall be offered in tracts not greater than one section. All rents shall be payable annually in advance, and no

term of lease shall exceed five years, nor shall any lease be valid until it received the approval of the Governor.

Provided, that any lessee of school and public lands shall, at the expiration of a five-year lease, be entitled, at his option, to a new lease for the land included in his original lease, for a period of time not exceeding five years, without public advertising, at the current rental prevailing in the county in which such land is situated, at the time of the issuance of the new lease. The commissioner of school and public lands shall notify by registered mail each lessee or assignee on or before the first day of November first preceding the expiration of his lease that such lease will expire.

Such option shall be exercised by the lessee by notifying the commissioner of school and public lands by registered mail, on or before the first day of December first preceding the expiration of his lease describing the lands for which he desires a new lease, in the same manner as the same is described in his original lease.

SDCL 1-26-1

As used in this chapter unless the content otherwise plainly requires:

(1) "Agency" means each association, authority, board, commission, committee, council, department, division, office, officer, task force or other agent of the state vested with the authority to exercise any portion of the state's sovereignty. The term does not include the Legislature, the unified judicial system, any unit of local government or any agency under the jurisdiction of such exempt departments and units unless the department, unit or agency is specifically made subject to this chapter by statute;

(d) executive orders issued by the Governor;

(7) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law, policy, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:

(a) statements concerning only the internal management of an agency and not affecting private rights or procedure available to the public, or
(b) declaratory rules issued pursuant to § 1-26-15;
(c) official opinions issued by the attorney general pursuant to § 1-11-1;
(d) executive orders issued by the Governor;
(e) student matters under the jurisdiction of the board of regents;

SDCL Chapter 5-5

5-5-1.

Terms used in this chapter mean:

(1) "Commissioner," the commissioner of school and public lands;
(2) "Lessee," the original leasee, or the assignee of such lease, provided the assignment has been made upon the reverse of the original copy of the lease, or a certified copy thereof, and provided further that such assignment shall have been submitted to the commissioner on or before the first day of November first preceding the expiration date of the lease;
(3) "Lease," the original lease or a certified copy thereof.

5-5-2.

Whenever the term "agricultural purposes" is used in this chapter, it is intended to mean for the purpose of breaking, plowing, farming, planting to annual crops of grain and to crops of alfalfa, clover, timothy, and bluegrass, and shall not include the use of lands for meadow and pasturage purposes, while growing only the native grasses.

5-5-3.

The board of school and public lands shall designate from time to time such lands as may be leased for meadow and pasturage purposes only, also such lands as may be leased for either meadow and pasturage, or for agricultural purposes.

It shall establish such regulations as in its judgment shall be necessary in order that such lands may be leased most profitably, for the state and upon designation of the lands as herein provided, the commissioner shall proceed to offer the same for lease.

5-5-4.

All common school, indemnity, and endowment lands shall be leased for pasturage, meadow, farming, the growing of crops of grain and general agricultural purposes, and at public auction after notice as provided in §5-5-5 and amendatory acts and in tracts not greater than one section.

5-5-5.

Whenever lands situated in any county shall be designated as provided in §5-5-3, such lands shall be advertised for lease at public auction by the publication, once each week for at least nine consecutive weeks in a newspaper of general circulation published nearest such lands, of a notice stating the time and place at which the leasing of

such lands will begin. A notice of such leasing shall also be published once each week for at least sixty days in a newspaper of general circulation published at the county seat of the county in which the lands are located.

5-5-6.

The lands designated, shall be offered for lease at public auction to the highest bidder, at the courthouse of the county within which the lands are situated; or, if there be no courthouse, at the building in which the office of the county auditor is located, and between the hours of ten o'clock a.m. and five o'clock p.m. only. The offering for lease shall be conducted by the county auditor, in accordance with the provisions of this chapter, and such instructions as the board of school and public lands may deem necessary.

In case the office of county auditor is vacant or the incumbent thereof is unable to act the duties of such officer prescribed in this chapter shall devolve, during such vacancy or inability, upon the register of deeds.

5-5-7.

Any unorganized county containing lands which the board of school and public lands shall deem advisable to offer for lease, shall be attached for leasing purposes to some organized county to be designated by the Governor, and it shall be the duty of the county auditor and the county treasurer of such organized county to perform the same services in connection with the leasing of lands situated in such unorganized county as they may be required to perform in connection with leasing of lands situated in such organized county.

5-5-8.

When a tract is offered for lease and no satisfactory bid is received therefor, the legal subdivisions thereof, if any, may be separately offered; or such tract may be offered in connection with contiguous tracts which have been offered and for which no acceptable bid has been received.

The auction shall continue from day to day until all tracts of lands advertised for lease shall have been offered. The county auditor or his representative may for good cause adjourn the auction for a period of not more than three days.

5-5-9.

Not more than six hundred forty acres shall be leased for agricultural purposes to any one person, firm, or corporation. The commissioner shall approve no lease for agricultural purposes unless the lessee has subscribed and sworn to an affidavit setting forth the fact that he is not, either directly or indirectly, the lessee of more than six hundred forty acres of common school or endowment lands for agricultural purposes, including the land applied for.

5-5-10.1

Terms used in §§ 5-5-10.2 to 5-5-10.4, inclusive, mean:

(1) "Animal unit," one cow and calf, one horse, five sheep or five goats;
(2) "Animal-unit-month carrying capacity," the number of animal units which can subsist on natural feed on one section of land for one month;
(3) "Rental rate," of fifty cents plus three times the average price per pound of all beef cattle on the farms in South Dakota for the last reported five years.

5-5-10.2

It shall be the duty of the commissioner of school and public lands, as rapidly as practicable to cause the grazing lands administered by the state to be appraised as to their animal-unit-month carrying capacity, and to make and preserve a record thereof in his office, and at least every ten years cause said lands to be re - examined as to their animal-unit-month carrying capacity so as to keep the records thereof in his office reasonably accurate.

5-5-10.3

In appraising such grazing lands the following factors shall be taken into consideration:

(1) Inventory of the forage resources: kind, amount, and location of vegetation;
(2) Accessibility and usability of the forage resources as influenced by topography, availability of stock water and season of usability;
(3) Condition of soils -- the erosion situation;
(4) Other and related resources such as timber and watershed protection;
(5) Animal-unit-month carrying capacity used by other public agencies in the same locality;
(6) Pertinent facts and figures submitted by stockmen living in the area and directors of state grazing districts including the land or in its vicinity;
(7) Carrying capacity set for similar land in a state grazing district in which the land is situated.

5-5-10.4

The board of school and public lands shall establish the minimum annual rental rate per acre of all grazing lands which are administered by the board of school and public lands.

In fixing the minimum annual rental per acre, the following formula shall be used:

The rental rate shall be multiplied by twelve times the animal-unit-month carrying capacity of each section of land or portion thereof divided by the number of acres of such section of land or portion thereof. In this formula, animal-unit-month carrying capacity shall be based on an appraisal made within the immediate past thirty - six month period. an appraisal made within the immediate past thirty-six month period.

The carrying capacity of the land, to be used in the above formula, shall be in accordance with the determination of the commissioner of school and public lands made pursuant to the appraisal of grazing lands provided in § 5-5-10.2.

The average price per pound of all beef cattle on the farms in South Dakota shall be taken from statistics published by the South Dakota crop and livestock reporting service of the United States department of agriculture current at the time of computation of the rental.

5-5-11.

All rents shall be payable annually in advance and no term of lease shall exceed five years, nor shall any lease be valid until it receives the approval of the Governor. Provided, however, that any lessee of such common school, indemnity, or endowment lands shall at the expiration of a five-year lease, be entitled, at his option, to a new lease for the land included in his original lease, or such portion thereof which has not been sold, for a period of five years.

5-5-12.

It shall be optional with the board of school and public lands to accept a bid for a lease covering a period of one year or more, not exceeding five years and in case no bids or proposals are made for any term, under the publication required in § 5-5-5, or in case of a failure from any cause to complete the leasing of any tract offered, it shall within six months thereafter be lawful to lease such lands under the provisions of this chapter without a readvertisement.

5-5-13.

The commissioner is authorized to lease cultivated lands for the period of two years for the purpose of summer-fallowing the first year and order to clear the land of noxius weeds, the lessee to pay only one year's rent for the same. When any lands are leased as above provided, the person leasing the same, before the lease is approved by the commissioner, shall pay to the county treasurer of the county in which the land is situated the total amount of rent therefor. Should the lessee so renting the land as above provided fail or neglect to summer-fallow the same at the proper time, the commissioner in his discretion may declare the lease canceled and the amount paid theron will thereby become forfeited.

5-5-14

Nothing herein contained shall in any way retard or prevent the sale of common school, indemnity or endowment lands as provided in § 5-9-1 nor prevent the commissioner from incorporating, into each lease a sales clause permitting the cancellation of any lease on January first of any year of the term thereof for the purpose of sale.

5-5-15.

Whenever the highest offer for any tract of land is satisfactory and the tract is reserved for the bidder, such bidder must at once deposit with the county treasurer the amount specified as the annual rental for the tract and take the treasurer's receipt therefor, a copy of which shall be retained by the treasurer in his office. The bidder shall exhibit such receipt to the county auditor who shall thereupon prepare a lease of such tract, in duplicate according to the form which the board of school and public lands shall prescribe and shall procure the signature of the lessee thereto. Upon procuring such signature the county auditor shall transmit to the commissioner the lease so executed.

If the commissioner approves such lease, he shall submit the same to the Governor for his approval. Should the Governor approve the lease he shall certify such approval and the commissioner shall thereupon execute the same in duplicate on behalf of the state and file a copy of the lease and the Governor's approval in his office and transmit one copy of the lease to the county auditor, who shall deliver the same to the lessee, and notify the county treasurer of the execution and approval of the lease. The county treasurer shall then pay to the state treasurer the sum deposited by the lessee.

Should the commissioner or the Governor disapprove the proposed lease, the county treasurer shall thereupon return to the bidder the sum deposited in full, taking such bidder's receipt issued to such bidder.

5-5-16.

Except as otherwise provided, the rent for all leased lands must be paid annually in advance and must be promptly paid when due, to the treasurer of the county where the tract is situated.

5-5-17.

Whenever any lessee shall fail to pay the annual rental for any lands leased when the same becomes due, it shall be optional with the commissioner to bring suit against such lessee in any court of competent jurisdiction in the county in which the land is situated, for the recovery of such rental, damages, and costs occasioned by such failure, or to declare such lease forfeited and to proceed to offer such lands of lease.

In case the commissioner consider it to the interest of the state to commence suit against such lessee, it is hereby made the duty of the state's attorney of such county to commence and prosecute such suit whenever he is directed to do so by the commissioner. All money arising from such suit shall be paid into the county treasury of the proper county and be placed to the credit of the interest and income fund of the class to which such lands belong.

5-5-18.

Any person leasing school or endowment lands for agricultural purposes shall destroy all quitch grass and all noxious weeds growing on any lands so leased before any seeds are formed in any such weeds, and in no case later than the fifteenth day of August of each year.

Lessees of school or endowment lands for agricultural purposes must plow the land each year, except that when planted to corn it may be planted or sown to some other grain the following year without plowing, or unless planted or sown to some grasses, such as clover, timothy, alfalfa, or bluegrass.

5-5-19.

No lessee of land for agricultural purposes shall burn or permit to be burned any hay, straw,

stubble, or cornstalks on the land covered by his lease, and the commission of such waste or any other waste upon any such land by the lessee shall cause a forfeiture of the lease and shall render the lessee liable to the state for damages caused by such waste. Actions to enforce the provisions of this section shall be prosecuted by the state's attorney of such county, whenever he is directed so to do by the commissioner, in any court of competent jurisdiction of the county in which the land is situated.

5-5-20.

The lessee of any school or endowment lands may assign his lease to any third person provided that before any such assigment of a lease shall be effective, the assignment shall be approved by the commissioner and a copy thereof filed by the commissioner. The subletting of any school and endowment lands by the lessee thereof for profit is here by specifically prohibited and the commission of such an act shall be cause for the forfeiture of the lease and shall render the lessee liable to the state for damages in double the amount of the difference between the lease rental and the amount paid or agreed to be paid from the sublessee.

5-5-21.

Actions to enforce the provisions of § 5-5-20 shall be prosecuted by the state's attorney of such county, whenever he is directed so to do by the commissioner, in any court of competent jurisdiction of the county in which the land is situated. The gross amount awarded by such court shall be paid to the county treasurer of the county in which the land is situated and by him creditied to the same account and in the same manner as the lease rental on such lands is credited.

5-5-22.

In offering any land for leasing or at any time after the lease has been made, the commissioner of school and public lands may grant to any lessee of land under the provisions of this chapter a permit to erect thereon such buildings, corrals, fences, and well apparatus as may be necessary to fully carry out the purposes of the lease, and such lessee shall have the right to remove such improvements as are capable of removal without damage to the land at any time before the expiration of the term or upon cancellation of the lease, and during a period of sixty days from the date upon which such land is offered for re-leasing or sale, and may sink such wells and construct such dams thereon as may be necessary, the cost of which shall not exceed twenty-five hundred dollars. In addition, the commissioner of school and public lands shall have the authority to grant in like manner a permit to prepare the ground and to plant shelter belts on such land, and to perform government approved ripping, furrowing, contouring and reseeding. Provided that the lessee shall notify the county auditor and the commissioner of school and public lands in writing whenever any such improvements are placed upon such lands. In no event shall the state become liable for any material furnished for, nor any labor performed on, such improvements.

5-5-23.

If such improvements are not removed in the manner and within the time specified in § 5-5-22 or within such further period as may be granted by the commissioner for good cause shown, or unless such improvements are disposed of as hereinafter provided, then such improvements shall become the property of the state without further consideration. In the event that any lessee, who, upon the

expiration of his lease, re-leases such tract of land at the letting, any permit for improvements previously issued and his rights to the same shall be automatically renewed for the period of time covered by such new lease without any further action on the part of such lessee.

5-5-24.

After the first day of September of the third and last year of such lease on land for agricultural purposes the lessee may apply for and may receive a permit from the commissioner of school and public lands in the same manner as other permits for improvements are granted for fall plowing for the planting of a crop the following spring, and in addition thereto the cost of the planting of a crop in the fall.

In no case shall the permit exceed the actual cost of plowing the land, and in case the land is seeded in the fall, not more than the actual additional cost of the seed and the seeding of the same.

Such permit shall have the full force and effect of permits for other improvements and shall be handled in like manner.

In the event a board of appraisal as hereinafter provided shall be required to appraise the value of such improvements, they shall not take into consideration the value of any crop growing on the lands covered by a permit but shall appraise only the cost of preparing the land and seeding the same.

5-5-25.

The commissioner shall notify each lessee by registered mail directed to his post-office address, as shown by the records in the office of the commissioner, on or before the first day of November first preceding the expiration of each

lease that such lease will expire the following March first. Such notice shall be made in triplicate and two copies thereof mailed to the lessee.

The commissioner shall state in such notice the rental rate at which such lease can be extended for an additional five years. Such rate shall be the current rental on common school, indemnity, and endowment lands prevailing in the county in which such lands are situated at the time of the issuance of the notice to the lessee above mentioned.

5-5-27.

If the lessee wishes to exercise his option to receive a new lease, he shall sign one copy of the duplicate notice mailed to him by the commissioner as hereinbefore provided and shall mail the same together with the original copy of the lease to the commissioner by registered mail on or before the first day of December first preceding the expiration date of the lease. Upon receipt of the signed option and the original copy of the lease, the commissioner shall endorse a five-year extension or renewal on such original copy of the lease and upon the duplicate copy of the lease filed in the office of the commissioner, and shall return the endorsed original to the lessee and shall enter such lease on the statement furnished by the commissioner to the several county treasurers as provided in §5-10-5 and amendatory acts and the lessee may pay the county treasurer in the same manner and at the same time as payments on other leases are made.

5-5-28.

Whenever the board of school and public lands shall offer any school or endowment agricultural lands for re-leasing before the expiration of an

existing lease and the lands are leased to any person other than the holder of the unexpired lease, such lease shall permit the new lessee to enter upon such land for the purpose of fall plowing, such board being careful to prescribe proper rules and regulations for safeguarding the rights of the holder of the unexpired lease. Such new lease shall be dated as of the first day of January following the date of leasing when the first year's rent shall be paid.

5-5-29.

When improvements are shown to be located on any school or endowment lands which have been under lease, and which have been offered for re-leasing or sale, and a person other than the owner of the improvements thereon is the highest bidder therefor, such bidder, before a lease or conveyance shall issue, shall deposit with the county auditor his receipt showing payment of the amount of rental due, and in addition thereto a receipt showing that he has deposited with the county treasurer an amount equal to the appraised value of such improvements, as shown by the report of the board of appraisal hereinafter provided for, or an amount agreed upon between such successful bidder and the owner of such improvements, or proof that the owner elects to remove all of such improvements.

5-5-30.

If the owner of the improvements described in § 5-5-29 elects not to remove them and he cannot agree with the successful bidder on the value of such improvements, he shall within five days from the date on which the land is offered for re-leasing or sale make application to the county auditor asking for the appraisement of such improvements by a board of appraisal appointed by the county auditor in the manner hereinafter provided. Such owner

shall be required to make a deposit sufficient to cover the cost of appraisal as determined by the county auditor, the board of appraisal to be paid by the county auditor out of such deposit.

5-5-31.

All improvements thereon, if any there be, shall be appraised by a board of three disinterested freeholders who shall be residents of the county wherein the property is situated. Said board shall be constituted as follows: The owner of the improvements shall nominate a person to represent him; the new lessee or purchaser shall nominate a person to represent him; these two shall nominate a person to serve with them. The county auditor shall appoint these three persons as a board of appraisal. Said board shall file with the county auditor an itemized report of such appraisal signed by at least two members of such board. It shall be the duty of the county auditor to keep a record of such aprraisement. Such board of appraisal shall be paid at the rate of ten dollars per diem and ten cents per mile for the miles necessarily traveled in making such appraisal.

5-5-32.

In case such improvements are so appraised, the owner of such improvements shall accept or reject such appraisement by written notice to the county auditor within five days from the date of appraisement or such appraisal shall be deemed rejected and a lease or conveyance shall issue.